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IN THE

Supreme Court of the United States

OCTOBER TERM 1997

KEN MIZUNO AND DOMINIC GENTILE,

Petitioners

v.

DUKE SALISBURY, CHAPTER 11 TRUSTEE,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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42 pp

QUESTION PRESENTED

Whether this Court should grant review to resolve a split of authority within the Circuits as to whether a District Court remand order to a Bankruptcy Court, pursuant to 28 U.S.C. § 158, is final and reviewable by a Court of Appeals.

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Opinion Below

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 125 F.3d 858 (9th Cir. September 17, 1997) as (unpublished) *In re Ken Mizuno, Debtor.*

Jurisdiction of this Court

The judgment below was entered on September 17, 1997, App. 1a, and rehearing was denied on December 16, 1997, App. 20a. This Court has jurisdiction to issue the writ of certiorari under 28 U.S.C. § 1254.

Statutory Provisions at Issue

28 U.S.C. § 158 provides in relevant part that:

> (a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.
>
> . . . .
>
> (d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

Statement of Facts

On June 19, 1992, Kengo Ohashi, the Japanese Administrator of the Japanese bankruptcy estate of Ken Mizuno, filed an involuntary Chapter 11 petition as the sole "Petitioning Creditor" against Ken Mizuno in the Bankruptcy Court for the Central District of California. Under Japanese bankruptcy law, Mr. Ohashi's administrative authority was

limited to property located in Japan. Mr. Ohashi's involuntary bankruptcy petition against Mizuno was pursuant to 11 U.S.C. § 303, and not as an ancillary proceeding to a foreign bankruptcy under 11 U.S.C. § 304.

Mr. Ohashi simultaneously filed a "consent" to the involuntary petition he had filed, and the Bankruptcy Court entered an order for relief on the same day as the filing of the bankruptcy petition, June 19, 1992. Mr. Mizuno later unsuccessfully moved to vacate the order for relief. On October 7, 1992, the Bankruptcy Court denied the motion to vacate in an order which promised findings and conclusions within sixty days but otherwise provided no explanation for the refusal to vacate the order of relief. No subsequent findings were entered, and Mr. Mizuno did not appeal the October 7, 1992 Order, thus making it a final order.

Thereafter, Mr. Ohashi never sought to be appointed as trustee for the Mizuno Chapter 11 estate, nor did he hold himself out to be the debtor in possession of that estate. On January 11, 1995, Mr. Ohashi, purporting to represent the "Bankruptcy Estate of Ken Mizuno", filed an adversary action in the Mizuno bankruptcy proceedings against Mr. Mizuno and his criminal defense counsel Dominic Gentile.[1] The adversary complaint alleged that Ohashi was properly in control of the Mizuno estate because of the October 7, 1992 unappealed order denying Mizuno's motion to vacate the order of relief.

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[1] Mr. Mizuno, a Japanese citizen and resident, was indicted on June 19, 1992 in the United States District Court for the District of Nevada for the international transportation of alleged fraud proceeds from Japan into the United States. The gist of the criminal allegations are that Mizuno, in concert with others, fraudulently oversold memberships in a Japanese country club, and then transported the proceeds of this alleged fraud into the United States.

Mr. Ohashi's adversary complaint alleged that Mizuno and his criminal defense counsel were violating the automatic stay applicable to the Mizuno bankruptcy proceedings by prosecuting a petition for relief in the United States District Court for the District of Nevada from a criminal forfeiture order entered against a related company previously owned by Mr. Mizuno known as Ken International (KI). The KI criminal forfeiture order had been entered in October 1993 pursuant to a plea agreement between the federal government and Mr. Ohashi, purporting to act as the "administrator" of Ken International Chapter 11 estate. Substantial assets in the United States were forfeited, and, pursuant to the agreement, most were ultimately transferred to Ohashi for distribution to another Japanese corporate bankruptcy estate.

Ohashi moved for summary judgment on his automatic stay violation complaint, which was granted by the Bankruptcy Court on March 10, 1995. Defendants Mizuno and Gentile opposed summary judgment on a variety of grounds, including that Ohashi lacked standing to bring a stay violation claim on behalf of the Mizuno estate because he was neither its trustee nor its debtor in possession. Bankruptcy Court entered a permanent injunction against Mizuno and his counsel prohibiting them from violating the stay. The Bankruptcy Court ruled that Ohashi's standing to represent the Mizuno estate was secured by the unappealed and final order of October 7, 1992 denying Mizuno's motion to vacate the order of relief.

Mizuno and his counsel appealed the Bankruptcy Court's first summary judgment ruling,[2] and argued again on appeal that Ohashi lacked standing to initiate or to prosecute the

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[2] The Bankruptcy Court entered final judgment as to Mr. Mizuno on March 10, 1995, and later entered partial summary judgment as to his counsel; the District Court granted counsel leave to appeal on an interlocutory basis.

adversary action, and that this lack of standing deprived the Bankruptcy Court of jurisdiction over the adversary complaint. In particular, Mizuno and Gentile contended that, under the Bankruptcy Code, a Chapter 11 debtor becomes the debtor-in-possession of estate property upon entry of the order for relief, and remains so until the statutory procedures for his ouster have been perfected, none of which had been invoked in the Mizuno bankruptcy proceedings. *See* 11 U.S.C. §§ 1104(a) (court may, upon application notice hearing, and for cause, order appointment of trustee); 11 U.S.C. § 1104(c) (upon court order, U.S. Trustee shall appoint a qualified, disinterested trustee); 11 U.S.C. § 1107 (a) absent appointment of trustee, debtor shall have all rights and powers of trustee). *See also* F.R.Bank. P. 6009 (trustee or debtor may represent estate). By contrast, the standards and procedures for commencing an involuntary bankruptcy under 11 U.S.C. § 323 do not address or resolve the issue of estate administration, rather they merely establish whether insolvency has been proven. *See, e.g.* 11 U.S.C. § 303; F.R. Bank P., 1003, 1011, 1018. In turn, Ohashi contended on appeal that the District Court could not "revisit" the issue of Ohashi's standing because that had allegedly been conclusively and finally adjudicated by the final October 7, 1992 Order denying the motion to vacate the order of relief.

On June 23, 1995, the District Court, sitting on appeal, reversed the summary judgment, and held that Ohashi lacked standing to bring the adversary action because he was neither the trustee nor the debtor of the Mizuno estate. App. 17a. More specifically, the District Court reviewed the October 7, 1992 order and concluded that it neither expressly or by implication conferred standing upon Ohashi to act as the trustee or debtor of the estate, which are prerequisites for standing to bring an automatic stay violation complaint. In addition, the District Court, citing this Court's opinion in *National Organization of Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994), observed

that lack of standing deprives a court of subject matter jurisdiction. Thus, the District Court reversed the bankruptcy court judgment and remanded the case back to the Bankruptcy Court. App. 16a.

Ohashi did not thereafter appeal this June 21, 1995 adverse standing ruling to the Ninth Circuit. Instead, Ohashi filed another motion in the Bankruptcy Court for summary judgment on remand, contending that his standing had been conclusively resolved by the October 7, 1992 Order. Mizuno and Gentile opposed summary judgment on the ground, among others, that Ohashi's standing had previously been adjudicated in the earlier appeal, and that preclusion doctrines prevented a second adjudication of this unappealed District Court ruling based upon the same record and the same claim.

On September 5, 1995, the Bankruptcy Court granted Ohashi summary judgment for a second time, holding again that the October 7, 1992 Order had conclusively adjudicated Ohashi's standing. The Bankruptcy Court held that, by this 1992 Order, it had conferred upon Ohashi the powers of a debtor in possession of the Mizuno estate. The Bankruptcy Court ruled that Mr. Mizuno and Mr. Gentile had violated the automatic stay and imposed stay damages of $300,000, representing Ohashi's legal fees for prosecuting the adversary complaint up through the first appeal in the District Court.

Mizuno and Gentile appealed the September 5, 1995 Bankruptcy Court judgment to the District Court, contending again that Ohashi lacked standing. On November 23, 1995, the District Court agreed, and remanded with instructions to dismiss the complaint. App. 9a. The District Court held that, in an American bankruptcy estate under Chapter 11, the Bankruptcy Code governs who has estate administration powers, and the procedures by which they are transferred. The District Court rejected the Bankruptcy Court's claims that

either comity or the Code authorized a Bankruptcy Court to oust a debtor in possession (Mizuno) and transfer his estate administration powers to a non-debtor such as Ohashi, as opposed to the Code-authorized transfer of such powers to an eligible and appointed estate trustee. App. 9a-15a.

Ohashi appealed this second remand order to the Ninth Circuit Court of Appeals. Ohashi also moved the Bankruptcy Court to convert the Mizuno bankruptcy case to an ancillary proceeding under 11 U.S.C. § 304 or to appoint a trustee. On December 15, 1995, Mr. Salisbury was appointed trustee of the Mizuno estate. Mr. Salisbury likewise filed an appeal from the District Court's November 23, 1995 ruling.

On September 17, 1997, more than two years after the District Court's original remand order holding that Ohashi lacked standing, the Ninth Circuit reversed the District Court, and held that Ohashi had standing by virtue of the October 7, 1992 order denying Mizuno's motion to vacate the order of relief. App. 1a. In order to reach this conclusion, the Ninth Circuit held that unappealed June 23, 1995 District Court order remanding the adversary action to the Bankruptcy Court (for lack of standing by Ohashi and jurisdiction by the Court) was not final or appealable, and that Bankruptcy Court's subsequent reconsideration of Ohashi's standing was within the scope of the remand. App. 3a. The Ninth Circuit went on to hold that the earlier, October 7, 1992 order denying the motion to vacate the order of relief, was entitled to preclusive effect, and that this 1992 Order conclusively established that Ohashi had standing to initiate the action for the automatic stay violation in 1995.

In other words, the Ninth Circuit held that the unappealed June 21, 1995 District Court order remanding the adversary complaint back to the Bankruptcy Court for lack of jurisdiction was not a final or appealable judgment. Because the June 1995

remand order lacked finality and was therefore unappealable, the Ninth Circuit concluded that Ohashi was not precluded from relitigating the issue of his standing in Bankruptcy Court. The Ninth Circuit then implicitly reversed the unappealed June 23, 1995 District Court ruling by holding (to the contrary) that Ohashi's standing had been conclusively established by the October 7, 1992 order affirming the original order of relief in bankruptcy, such that neither Ohashi nor his successor Salisbury were required to relitigate the issue in the 1995 adversary action. In effect, the Ninth Circuit held that the Bankruptcy Court was free, on remand from the District Court's July 1995 unappealed order, to reach the opposite jurisdictional conclusion as had the District Court based upon the same record and relying on the same order (of October 7, 1992) which had been found inadequate by the District Court to confer standing upon Ohashi.

ARGUMENT

A substantial split of Circuit authority exists as to the finality of District Court remand orders to Bankruptcy Courts such that the finality of a District Court remand order to a Bankruptcy Court, based upon a finding of no subject matter jurisdiction, raises important issues regarding the uniform application of bankruptcy law and procedure.

The federal circuit courts are divided as to the finality of District Court remand orders issued pursuant to 28 U.S.C. § 158, when District Courts sit as appellate courts over Bankruptcy Court rulings. Compare *In re Marin Motor Oil, Inc.*, 689 F.2d 445 (3d Cir. 1982) (remand orders final), *cert. denied*, 459 U.S. 1206 (1983) with *In re Riggsby*, 745 F.2d

1153 (7th Cir. 1984) (remand orders not final) (Posner, J.).[3] This split of authority is of longstanding, and has been acknowledged by lower courts since at least 1985. *See, e.g., In re Commercial Contractors, Inc.*, 771 F.2d 1373, 1374 (10th Cir. 1985) (noting split in circuits). Indeed, the disarray of precedent on this issue has caused one respected bankruptcy commentator to characterize the question as "hopelessly confused." 1 Collier, ON BANKRUPTCY, ¶3.03[6][b] at 3-194 (15th ed. 1995).[4] *See also* Note, WHEN IS AN ORDER FINAL?: A RESULT-ORIENTATED APPROACH TO THE FINALITY REQUIREMENT FOR BANKRUPTCY APPEALS TO FEDERAL COURTS, 74 Minn. L. Rev. 1337 (1990)(describing conflicts).[5]

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[3] The Third Circuit's *Marin Motor Oil* opinion has been endorsed directly or indirectly by the Eighth and Sixth Circuits. *In re Bestman*, 720 F.2d 484 (8th Cir. 1983); *In re Gardner*, 810 F.2d 87 (6th Cir. 1987). The Seventh Circuit's contrary holding in *Riggsby* is followed by the First, Second, Fourth, Fifth, Tenth, and Eleventh Circuits. *In re Abdallah*, 778 F.2d 75, 76 (1st Cir. 1985), *cert. denied*, 476 U.S. 1116 (1986); *In re Prudential Lines, Inc.*, 59 F.3d 327, 331 (2d Cir. 1995); *In re The Wallace & Gale Co.*, 72 F.3d 21, 24 (4th Cir. 1995); *In re Aegis Specialty Mktg, Inc.*, 68 F.3d 919 (5th Cir. 1995); *In re Wiston XXIV Ltd. Partnership*, 988 F.2d 1012 (10th Cir. 1993); *In re TCL Investors*, 775 F.2d 1516, 1518 (11th Cir. 1985).

[4] Indeed, the Ninth Circuit's own precedent in this area is contradictory, compare *In re Martinez*, 721 F.2d 262, 265 (9th Cir. 1983) (remand not final) with *In re Bonner Mall Partnership*, 2 F.3d 899, 904-05 (9th Cir. 1993) (remand order final if central issue is legal and (1) resolution could obviate need for fact finding, or (2) review would materially aid bankruptcy court on remand), motion to vacate denied and case dismissed as moot, 115 S. Ct. 386 (1994)). *See In re Commercial Contractors, Inc.*, 771 F.2d 1373, 1375 (10th Cir. 1985) (noting that one panel of Ninth Circuit has adopted *Marin* position while another panel adopted *Riggsby*).

[5] *See generally*, Hennigan, TOWARD REGULARIZING APPEALABILITY IN BANKRUPTCY, 12 Bank. Dev. J. 583 (1996).

In general, the courts which hold remand orders to be final, base their conclusion on the fact that a district court ruling on appeal finally resolves the appeal, and the circuit courts exercises essentially the same scope of appellate review of the bankruptcy court, therefore requiring no further delay or development of the record *Marin*, 689 F.2d 445, 447-48. Conversely, those courts which hold to the majority view that remand orders are non-final have focused on the fact that some further proceedings are required before the bankruptcy court, and have analogized this process to remands to administrative agencies. *Riggsby*, 745 F.2d at 1156. Some opinions, while adhering to the majority view that district remand orders are generally not final, have made exceptions when the remand is merely "ministerial," such as to correct a purely formal defect. *In re Stoecker*, 5 F.3d 1022, 1026 (7th Cir. 1993) (Posner, J.). *Accord In re Jove Engineering, Inc.*, 92 F.3d 1539, 1548 (11th Cir. 1996) (remand order final when matter remaining "is a ministerial duty that does not require significant judicial activity involving considerable discretion."). *See Gulf Refining Co. v. United States*, 269 U.S. 125, 136 (1925) (remand final if only ministerial duty left).

This Court has not previously addressed the issue of the finality of district court remand orders to a bankruptcy court, although this Court in *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249 (1992) held that 28 U.S.C. § 158 did not displace 28 U.S.C. § 1291 as a proper means for seeking court review. This issue is one of widespread concern to bankruptcy litigants, because, under well established precedent from this Court, a failure to appeal a final judgment waives any right to challenge the order, and implicates preclusion doctrines. *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398-402 (1981) (failure of certain parties to appeal adverse antitrust standing ruling precluded reliance on subsequent reversal on appeal; rejecting Ninth Circuit ruling that res judicata should be

flexibly applied to relieve party from consequences of failure to appeal erroneous judgment).

Here, the finality of the District Court's June 21, 1995 remand order for lack of subject matter jurisdiction is a dispositive issue. The original bankruptcy judgment of March 10, 1995 was final, and if the District Court's subsequent June 1995 ruling that Ohashi lacked standing (and the Bankruptcy Court therefore lacked jurisdiction) was likewise final, then Ohashi was obligated to appeal that ruling to the Ninth Circuit, rather than relitigating the issue before the Bankruptcy Court. The June 21, 1995 order is unequivocal, as the District Court stated that it "finds that Plaintiff lacked standing to bring the adversary action" App. 17a. Absent plaintiff standing to bring suit, neither the Bankruptcy Court nor the District Court had jurisdiction to proceed any further on the merits of Ohashi's complaint. *National Organization of Women, Inc.*, 510 U.S. 249, 255 (1994). Whether the District Court's standing ruling was correct, or erroneous, is a matter which could only be resolved by a higher court -- the Ninth Circuit. If the District Court's June 1995 finding of no jurisdiction was final, Ohashi could not thereafter challenge this ruling in the Bankruptcy Court or the Ninth Circuit, absent a timely and successful appeal.

In analogous circumstances, this Court, in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398-402 (1981), ruled that the res judicata doctrine precluded an unsuccessful antitrust plaintiff from relitigating an adverse, but erroneous, antitrust standing ruling when the litigant failed to appeal the ruling, even though other parties successfully appealed. *See Local 322, Allied Indus. Workers of America v. Johnson Controls, Inc.*, 969 F.2d 290, 292 (7th Cir. 1992) (citing Moitie, party's failure to seek certiorari precludes reliance upon reversal by Supreme Court). This Court has firmly held that a litigants' failure to appeal is a considered and

free choice, and that courts should not relieve litigants from the consequences of such "free, calculated, deliberated choices." *Ackermann v. United States*, 340 U.S. 193, 212 (1950).

Moreover, the issue addressed by the District Court in its June 1995 order--a court's subject matter jurisdiction--is one that this Court and lower federal courts have consistently held warrants application of res judicata, even if the jurisdictional ruling was erroneous. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 704 n.9 (1982) ("It has long been the rule that principles of res judicata apply to jurisdictional determinations--both subject matter and personal."); *North Georgia Elec. Membership Corp. v. Calhoun*, 989 F.2d 429, 432 (11th Cir. 1993); *Royal Ins. Co. of America v. Quinn-L Capital Corp.*, 960 F.2d 1286, 1293 (5th Cir. 1992); *Cutler v. Hayes*, 818 F.2d 879, 888-89 (D.C. Cir. 1987) (collateral estoppel applies to prior standing ruling because jurisdictional). If the District Court's June 21, 1995 remand order was final, it would have been a binding jurisdictional ruling entitled to preclusive effect. As a final jurisdictional ruling, neither the Ninth Circuit nor the Bankruptcy Court could overrule the District Court's June 1995 ruling absent a timely and successful appeal.

This Court has previously described a "final decision" as one that "'end[s] the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373-74 (1981) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). Indeed, this Court has repeatedly held that a "'court lacks discretion to consider the merits of a case over which it is without jurisdiction.'" *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 203 (1988) (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379-80 (1981)).

For more than a century this Court has consistently instructed lower federal courts that it is their affirmative duty to dismiss cases for which they lack subject matter jurisdiction. *See, e.g. Cutler v. Rae*, 48 U.S. (7 How.) 729 (1849); *Mansfield v. Swan*, 111 U.S. 379 (1884); *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908); *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939). Accord Fed. R. Civ. P. 12(h) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.")

Plaintiff standing is essential to a federal court's jurisdiction, *National Organization of Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994); *Heckler v. Matthews*, 465 U.S. 728, 737 (1984); *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969), and an absence of standing requires dismissal. *Greater Cincinnati Coalition for the Homeless v. City of Cincinnati*, 56 F.3d 710, 715 (6th Cir. 1995) (if "a party does not have standing to bring an action, however, a court has no jurisdiction over the matter and an order of dismissal must be entered"); *Hope, Inc. v. County of DuPage Il*, 738 F.2d 797, 804 (7th Cir. 1984) (same). Accordingly, under traditional finality principles, an unappealed finding of lack of standing to bring suit should constitute a ruling which "'end[s] the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373-74 (1981) .

Most certainly, the Bankruptcy Court, on remand, could not have any greater subject matter jurisdiction than the District Court on appeal. A finding by the District Court on appeal that it lacked subject matter jurisdiction for lack of plaintiff standing is a finding binding upon a Bankruptcy Court upon remand, especially where, as here, the asserted basis for plaintiff standing (the October 7, 1992 Order) was the same before and after the District Court's ruling of no subject matter

jurisdiction. In this regard, a Bankruptcy Court is not free to reverse a District Court's ruling made pursuant to 28 U.S.C. § 158. *See, e.g. Briggs v. Pennsylvania R.R. Co.*, 334 U.S. 304, 306 (1948) (lower court not free to ignore mandate of higher court).

Petitioners respectfully submit that this Court should grant plenary review of this case to determine and to clarify the finality principles applicable to remand orders issued by district courts acting pursuant to their appellate authority under 28 U.S.C. § 158(d). The application of uniform and clear principles is imperative in this area because it determines the presence of jurisdiction by all federal circuit courts, triggers a litigants' duty to perfect an appeal, and confers upon a prevailing party the right to rely upon the preclusive effects of an unappealed district court appellate ruling. For example, if the June 21, 1995 remand order of the District Court is final, Ohashi was obligated to perfect a timely appeal to obtain any reversal of the District Court's adverse standing ruling. If the District Court's remand ruling was a final and unappealed ruling, neither the Bankruptcy Court nor the Ninth Circuit could reverse this ruling. If finality applied to the June 23, 1995 District Court jurisdictional ruling, then the ensuing three layers and two years of federal litigation could have been avoided (the Bankruptcy Court proceedings on the merits on remand, the District Court reaffirmation of its prior jurisdictional ruling, and the subsequent appeal to the Ninth Circuit).

Absent application of some finality principles, a litigant prevailing in a statutorily-authorized bankruptcy appeal cannot rely upon the preclusive effect of district court appellate rulings on matters as fundamental as federal court jurisdiction. Moreover, denying finality to all district court bankruptcy remand orders will result in the anomalous situation found here--where a Circuit Court in effect reverses a prior

unappealed district court finding of no subject matter jurisdiction over an adversary action.

Both litigants and lower courts need clear guidance on the availability of circuit court review over district court rulings made under 28 U.S.C. § 158. Without such guidance, the preclusive character of district court rulings under § 158 is diminished, a consequence which can only increase the judicial burden on all levels of the federal judiciary.

CONCLUSION

For the foregoing reasons, we respectfully urge that the writ of certiorari be granted.

Respectfully submitted,

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Appendix

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[stamp—FILED; SEP 17 1997; CATHY A. CATTERSON, CLERK; U.S. COURT OF APPEALS]

* * * * * * * * * *

No. 96-55081
D.C. No. CV-95-00917-LHM

In re: KEN MIZUNO, Debtor.

KEN MIZUNO BANKRUPTCY ESTATE,
Plaintiff,

and

DUKE SALISBURY, Chapter 11 Trustee,
KENGO OHASHI,
Plaintiffs-Appellants,

v.

KEN MIZUNO, DOMINIC P. GENTILE,
TERRANCE G. REED,
Defendants-Appellees.

MEMORANDUM *

Argued and Submitted June 5, 1997
Decided Sept. 17, 1997.

Before BROWNING, FLETCHER and KOZINSKI, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

I.

Because Duke Salisbury has been appointed trustee of the Ken Mizuno bankruptcy estate, Kengo Ohashi cannot appeal the district court's holding that Ohashi lacked standing to initiate the action for violation of the automatic stay *See Moneymaker v. Cohen (In re Eisen),* 31 F.3d 1447, 1451 n. 2 (9th Cir.1994). Accordingly, we dismiss Ohashi from the appeal and substitute Salisbury.[1]

II.

All assets and claims belonging to the estate passed to Salisbury when he was appointed trustee. *Id* He, alone, had authority to decide whether to prosecute this appeal. Upon deciding to do so, he was required to secure the consent of this court to appear in this action. *See Herndon v. Howard,* 76 U.S. 664, 665 (1869); *see also* 2 Lawrence P. King *Collier on Bankruptcy* § 323.02[3], at 323-9 (15th ed.1996). Salisbury has not filed a formal motion to substitute or intervene. However, we may "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code. *See* 11 U.S.C. § 105(a). The Bankruptcy Code gives Salisbury the authority to prosecute this appeal on behalf of the estate, *id.* § 323, and he has expressed a desire to do so. We treat Salisbury's notice of appeal as an implicit request to appear in this action and grant his request.[2]

III.

The district court erred in revisiting the issue of whether Ohashi lacked standing to initiate the action for violation of

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[1] We treat Ohashi as an amicus curiae.

[2] For this reason, we deny Mizuno's motion to dismiss Salisbury's appeal.

the automatic stay. Mizuno did not appeal the bankruptcy court's order, issued October 7, 1992, denying him relief because it found that Ohashi could act as the debtor. That order is final. *United States v. Ken Int'l Co.*, (No. 95-10225, 1997 WL 229114, at * (9th Cir. May 2, 1997). Mizuno concedes that if Ohashi could act as the debtor, he had standing to initiate the automatic stay action.

The collateral estoppel doctrine precludes Mizuno from relitigating this issue. *See North Bonneville v. Callaway,* 10 F.3d 1505, 1508 (9th Cir. 1993). Ohashi's standing to initiate the action was at stake in the October 7 order; the issue of Ohashi's standing was actually litigated in that final order; the determination of Ohashi's standing was a necessary and critical part of that final order. *Id.*

Salisbury is not precluded from litigating Ohashi's standing. The district court's remand order was not final and appealable, *see Starbuck v. City & Country of San Francisco,* 556 F.2d 450, 457 n. 13 (9th Cir.1977), and reconsidering Ohashi's standing was within the scope of the remand. *Lindy Pen Co. v. Bic Pen Corp.*, 982 F.2d 1400, 1404 (9th Cir.1993). But because the bankruptcy court's October 7, 1992 order has preclusive effect on Mizuno with respect to this issue, Salisbury need not relitigate it. We hold that the bankruptcy court's final order is the law of the case and that Ohashi had standing to initiate the action for the automatic stay violation. Since we conclude that Ohashi had standing to initiate the suit, and Salisbury properly succeeds to Ohashi's interests, we find that Salisbury has standing to continue the automatic stay action.

IV.

The bankruptcy court did not err in holding Mizuno violated the automatic stay. We have held that "[a]ny property belonging to Mizuno became the property of the United

States Mizuno Bankruptcy Estate as of June 1992."[3] *Id.* at *2. The property of the bankruptcy estate includes the right to challenge the forfeiture of these pre-partition assets by filing a section 853(n) petition *See* 11 U.S.C. § 541(a). Mizuno violated the automatic stay by usurping this right of the estate. *See* 11 U.S.C. § 362(a)(3).

Mizuno argues that he did not violate the automatic stay because the estate abandoned its right to file the section 853(n) petition. However, the bankruptcy estate did not follow any of the procedures outlined in 11 U.S.C. § 554 for abandoning its property *See also In re Prospero,* 107 B.R. 732, 735 (Bankr.C.D.Cal.1989) (inaction by the bankruptcy trustee does not constitute abandonment).

We also reject Mizuno's claim that the automatic stay is inapplicable to a section 853(n) petition. Mizuno notes that the automatic stay does not bar "the commencement or continuation of a criminal action or proceeding against the debtor." 11 U.S.C. § 362(b)(1). However, this court has held that a section 853(n) petition is civil in nature *United States v. Alcaraz-Garcia,* 79 F.3d 769, 772-73 n. 4 (9th Cir.1996).[4]

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[3] This court rejected Mizuno's argument that because the acts giving rise to the forfeiture occurred before the bankruptcy estate was created, the forfeited property never became part of the bankruptcy estate. *See Ken Int'l Co.,* 1997 WL 229114, at *2.

[4] Also without merit is Mizuno's argument that the bankruptcy court should not have granted partial summary judgment because Ohashi filed his motion for leave to amend and his summary judgment at the same time. The amended complaint clarified the grounds on which Ohashi sought recovery but did not introduce new factual allegations or legal theories. Mizuno does not claim that he was prejudiced by Ohashi's actions. Nor did he file a Rule 56(f) affidavit seeking leave to conduct further discovery to respond to the amended complaint.

Because the bankruptcy court did not err in finding Mizuno violated the automatic stay, and Mizuno has not shown that the bankruptcy court erred in awarding damages for this violation, we affirm both the bankruptcy court's finding of liability and its damage award.

V.

The district court did not err in implicitly denying Mizuno's motion to recuse Judge Riddle Mizuno lacks standing to appeal the denial of his motion because he can show no harm Mizuno asked the district court to recuse Judge Riddle only from the adversary proceeding. The district court's order remanding the adversary proceeding with instructions to dismiss it could not have injured Mizuno.[5] Accordingly, we grant Salisbury's motion to dismiss Mizuno's appeal.

Ohashi's appeals, Nos. 96-55077 and 96-55082, are DISMISSED. Mizuno's appeals, Nos. 96-55170 and 96-55173, are DISMISSED. The district court's order holding Ohashi lacked standing to initiate the automatic stay action is REVERSED. The bankruptcy court's holding that Mizuno violated the automatic stay and its damage award are AFFIRMED.

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[5] Even assuming Mizuno had standing to appeal the denial of his recusal motion, the district court did not err in denying the motion. Judge Riddle's impartiality cannot reasonably be questioned. *See* 28 U.S.C. § 455; *Liteky v. United States*, 510 U.S. 540, 555-56 (1994).

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[stamp—FILED; SEP 29 1997; CATHY A. CATTERSON, CLERK; U.S. COURT OF APPEALS]

No. 96-55077
D.C. No. CV-95-00918-LHM

In re: KEN MIZUNO, Debtor.

KEN MIZUNO BANKRUPTCY ESTATE, a/k/a THE JAPANESE BANKRUPTCY ESTATE OK KEN MIZUNO,
Plaintiff-Appellant,

v.

KEN MIZUNO, DOMINIC P. GENTILE, TERRANCE G. REED,
Defendants-Appellees.

No. 96-55081
D.C. No. CV-95-00917-LHM

In re: KEN MIZUNO, Debtor.

KEN MIZUNO BANKRUPTCY ESTATE,
Plaintiff,

and

DUKE SALISBURY, Chapter 11 Trustee, KENGO OHASHI,
Plaintiffs-Appellants,

v.

KEN MIZUNO, DOMINIC P. GENTILE, TERRANCE G. REED,
Defendants-Appellees.

No. 96-55082
D.C. No. 95-00917-LHM

In re: KEN MIZUNO, Debtor.

KEN MIZUNO BANKRUPTCY ESTATE,
Plaintiff,

and

KENGO OHASHI, Administrator of the
JAPANESE BANKRUPTCY ESTATE OF
KEN MIZUNO,
Plaintiff-Appellant,

v.

KEN MIZUNO, DOMINIC P. GENTILE,
TERRANCE G. REED,
Defendants-Appellees.

No. 96-55170
D.C. No. CV-95-00917-LHM

In re: KEN MIZUNO, Debtor.

KEN MIZUNO BANKRUPTCY ESTATE,
DUKE SALISBURY, Chapter 11 Trustee;
KENGO OHASHI,
Plaintiffs-Appellees.

v.

KEN MIZUNO, DOMINIC P. GENTILE,
TERRANCE G. REED,
Defendants-Appellees.

No. 55173
D.C. No. 95-00918-LHM

In re: KEN MIZUNO, Debtor.

KEN MIZUNO BANKRUPTCY ESTATE,
KENGO OHASHI,
Plaintiffs-Appellees,

v.

KEN MIZUNO, DOMINIC P. GENTILE,
TERRANCE G. REED,
Defendants-Appellants.

Appeal from the United States District Court
for the Ninth Central District of California
Linda H. McLaughlin, District Judge, Presiding

Argued and Submitted June 5, 1997
Pasadena, California

ORDER AMENDING MEMORAMDUM DISPOSITION *

Before: BROWNING, FLETCHER and KOZINSKI, Circuit Judges

The Memorandum Disposition filed September 17, 1997 is amended as follows:

At page 7, in the third paragraph, the sentences beginning "The district court's order" and "The bankruptcy court's order" are amended to read: "Based on Salisbury's appeal, No. 96-55081, the district court's order holding Ohashi lacked standing to initiate the automatic stay action is REVERSED, and the bankruptcy court's holding that Mizuno violated the automatic stay and its damage award are AFFIRMED."

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NO. SA CV 95-917 LHM

BK SA 94-14429-LR
ADV SA 95-1043-LR

IN RE KEN MIZUNO, Debtor.

THE BANKRUPTCY ESTATE OF KEN MIZUNO,
Plaintiff,

v.

KEN MIZUNO, DOMINIC P. GENTILE,
TERRANCE G. REED, AND DOES 1 through 20,
Defendants.

ORDER

[stamp—FILED; NOV 21 1995; CLERK, U.S DIRTRICT COURT; CENTRAL DISTRICT OF CALIFORNIA; SOUTHERN DIVISION AT SANTA ANA; /s/ JL, DEPUTY]

Based upon the reasons set forth in the Court's Minute Order dated 11/27/95, which is incorporated herein;

IT IS ORDERED that the Order of the Bankruptcy Court entered September 5, 1995 granting summary judgment against defendant Mizuno and partial summary judgment against defendants Gentile and Reed is reversed and the abovementioned action is remanded to the bankruptcy court with directions to dismiss the adversary complaint.

DATED: 11/27/95

LINDA H. McLAUGHLIN
United States District Judge

Case No. SA CV 95-917-LHM (EEx)

Title: In re Ken Mizuno

PRESENT:

HON. Linda H. McLaughlin, JUDGE
Debra Beard, Deputy Clerk

PROCEEDINGS: APPEAL OF ORDER GRANTING SUMMARY JUDGMENT

IN CHAMBERS:

The Court has read and considered the voluminous record in this case together with the parties' briefs on appeal and has undertaken independent research. The Court recognizes the Bankruptcy Judge's efforts in working diligently for an equitable solution to the problems presented. However, as discussed below, the structure of the United States bankruptcy laws must be applied to the functioning of a plenary bankruptcy proceeding in the United States.

(1) **This Appeal:** On January 11, 1995, Ohashi filed an adversary action purportedly on behalf of the Bankruptcy Estate of Ken Mizuno ("KM Estate") alleging that Mizuno, Gentile, and Reed had violated the automatic stay of the Bankruptcy Code by filing a petition for relief from forfeiture under 21 U.S.C. § 853 (n) in the criminal proceedings against Ken International Ltd. pending in the Nevada District Court. On March 10, 1995, the Bankruptcy Court granted the KM Estate's motion for summary judgment. Defendants appealed. By minute order issued on June 21, 1995, this Court reversed and remanded. The KM Estate then filed another motion for summary judgment. On September 5, 1995, the Bankruptcy Court granted the motion. Defendants Mizuno, Gentile, and Reed now appeal.

(2) **Standard of Review.** This Court reviews *de novo* a bankruptcy court's grant of summary judgment. *In re Kroy*

(Europe) Ltd., 27 F.3d 367, 368 (9th Cir. 1994). A bankruptcy court's legal conclusions are reviewed *de novo,* and its findings of fact are reviewed for clear error. *In re Siriani,* 967 F.2d 302, 303-04 (9th Cir. 1992).

(3) **United States Bankruptcy Laws Control.** On June 11, 1992, Ohashi filed an involuntary petition pursuant to § 303 (b)(4), which named "Ken Mizuno" as the debtor. "In a plenary case commenced pursuant to § 303 (b)(4), which named "Ken Mizuno" as the debtor. "In a plenary case commenced pursuant to § 303 (b)(4), United States bankruptcy law controls. . . ." *In re Axona International Credit & Commerce Limited,* 115 B.R. 442, 447 (S.D.N.Y. 1990). "The filing of an involuntary case by a foreign representative pursuant to § 303 (b)(4) initiates an independent U.S. bankruptcy case creating an estate within the meaning of § 541 of the Code. The foreign debtor is afforded the same treatment as a domestic debtor." *Matter of Axona International Credit & Commerce Limited,* 88 B.R. 597, 606 (S.D.N.Y. 1988). The point is that the United States bankruptcy laws determine how a bankruptcy is organized and conducted in the United States. Therefore, the parties involved in a bankruptcy must be lined up in compliance with the United States bankruptcy laws, i.e., the trustee, debtor, and debtor-in-possession must satisfy the requirements of the United States bankruptcy laws for trustees, debtors, and debtors-in-possession.

(4) **Trustee.** It is agreed that no trustee has ever been appointed for the KM Estate.

(5) **Mizuno is the debtor.** Mizuno was and is "the natural living breathing debtor in this case." *See* 9/5/95 Memorandum of Decision, 35. Moreover, Mizuno was named as debtor when Ohashi filed the involuntary petition.

(6) **Debtor in Possession.** Under 11 U.S.C. § 1101 (1), " 'debtor in possession' means debtor except when a person

that has qualified under section 322 of this title is serving as a trustee in the case." Where no trustee is appointed, there is no distinction between the debtor and the debtor in possession. *See Matter of Griseuk,* 165 B.R. 956, 958 (M.D.Fla. 1994) ("In a Chapter 11 case, the debtor and the debtor-in-possession are one and the same"); *In re Chapel Gate Apartments, Ltd.,* 64 B.R. 569, 576 (N.D.Tex. 1986) ("There is no debtor entity separate and apart from the debtor-in-possession"); *In re Babbitt Hardware & Lumber, Inc.,* 746 F.2d 1329, 1331 (8th Cir. 1984); *Matter of Triangle Chemicals, Inc.,* 697 F.2d 1280, 1290 (5th Cir. 1983).

(7) **Standing to Contest Violations of the Automatic Stay.** Generally, "[o]nly the debtor or the trustee has standing to bring claims for violation of the automatic stay." 6/21/95 Minute Order, 2 (citing *In re Pecan Groves of Arizona,* 951 F.2d 242, 245 (9th Cir. 1991) ("Language from many cases indicates that, if the trustee does not seek to enforce the protections of the automatic stay, no other party may challenge acts purportedly in violation of the automatic stay"); *In re Brooks,* 79 B.R. 479, 481 (Bankr. 9th Cir. 1987) ("if the debtor or the trustee chooses not to invoke the protections of § 362, no other party may attack any acts in violation of the automatic stay"); *In re Stivers,* 31 B.R. 735, 736 (Bankr. N.D.Cal. 1983) ("the automatic stay operates in favor of debtors and estates (represented by trustees and debtors-in-possession) only . . . .").

(8) **The Bankruptcy Court Did Not Have Authority to Replace a Debtor in Possession.** § 1107(a) says that a debtor in possession's rights and powers are "[s]ubject to . . . such limitations or conditions as the court prescribes." Taken alone, this section does not state that a debtor in possession's rights and powers may be transferred to someone other than the debtor.

§ 105(a) states, "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). However, the Powers granted by § 105 may not be exercised in a way that is inconsistent with the provisions of the Bankruptcy Code. *See In re Momentum Mfg. Corp.*, 25 F.3d 1132, 1136 n.4 (2d Cir. 1994); *Matter of Oxford Management, Inc.*, 4 F.3d 1329, 1134 (5th Cir. 1993).

The Bankruptcy Court cited *Matter of Gaslight Club, Inc.*, 782 F.2d 767 (7th Cir. 1986), for the proposition that it had the authority to supplant Mizuno with Ohashi as debtor in possession. However, as discussed below, *Gaslight Club* is so factually distinguishable that it is not persuasive authority.

In *Gaslight Club,* the president of a debtor corporation was designated by the court to exercise the rights and perform the obligations of the corporation as debtor in possession. *Id.*, at 768-69. After the president failed to meet a court deadline for the filing of a plan, an appointed committee of creditors requested an order designating another person to operate the corporation and to exercise its debtor in possession powers. *Id.*, at 769. The order was entered, ordering the person to "perform the duties imposed upon the debtors by the applicable provisions of the Bankruptcy Code." *Id.* The president was then discharged by his replacement, so he filed a motion to appoint a trustee or to vacate the order of appointment. *Id.*

In upholding the replacement of the person exercising the power of the debtor in possession, the Court in *Gaslight Club* stated, "Sections 105 (a) and 1107(a) of the Bankruptcy Code provide adequate authority for the bankruptcy court to approve the replacement of the person designated to perform the duties and exercise the rights of the debtor in possession if the creditors' committee, the person presently

in control and the majority and controlling shareholder of the debtor agree to this course of action." *Id.*, at 771. The Court continued, "[W]e think the peculiar circumstances of the case before us as well as the consent on all sides to the procedure followed make this case different." *Id.*, at 772.

Gaslight Club distinguished *In re Martin,* 26 B.R. 39 (Bankr. S.D.W.Va. 1982), in which the Court held, "Neither the facts of this case nor the law justifies creation of a new entity known as 'successor' to the debtor in possession." *Martin,* 26 B.R. at 39-40 ("The alternatives available under the Code include appointment of a trustee, appointment of an examiner, and conversion or dismissal of the case"). First, the Court in *Gaslight Club* explained, *In re Martin* did not present "a corporate situation involving corporate control." *Gaslight Club,* 782 F.2d at 773. Second, *in In re Martin,* "the person to be replaced (who was dead) did not join in the request for replacement." *Id.* Most important is the fact that in *Gaslight Club* "[t]he debtor in possession was, and remained, [the corporation]. The only issue was who was to exercise the rights of the debtor in possession, which, since it was a corporation, obviously needed to act through an individual." *Id.*; *see also* Bankruptcy Rule 9001(5).

In the present case, Mizuno is an individual, not a corporation, so the reasoning of *In re Martin* applies rather than the reasoning of *Gaslight Club.* In *Gaslight Club,* the debtor-in-possession, the corporation, remained the same; only the individual who could exercise the corporation's rights as debtor-in-possession had changed. Here, Mizuno, as an individual, acts on his own behalf and not through another individual. Thus, allowing Ohashi to replace Mizuno changes the debtor-in-possession entirely; and neither *In re Martin* nor *Gaslight Club* grants a bankruptcy court the power to appoint someone to replace an *individual* debtor in possession. The Bankruptcy Court's interpretation of these

cases runs contrary to the definition of "debtor in possession," (*see supra*), in the bankruptcy code.

(9) **Summary.** In sum, the United States bankruptcy laws control. To have standing to bring this adversary complaint, Ohashi must be the trustee, debtor, or debtor-in-possession of the KM Estate. Because Ohashi is neither the trustee, debtor, nor debtor-in-possession, he lacks standing.

(10) **Ruling.** The Bankruptcy Court's Order granting Summary Judgment for Plaintiff is REVERSED. The matter is REMANDED with directions to dismiss the adversary complaint for lack of Ohashi's standing to bring the adversary complaint.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NO. SA CV 95-337 LHM
NO. SA CV 95-367 LHM

BK SA 94-14429-LR
ADV SA 95-1043-LR

IN RE KEN MIZUNO, Debtor.

KEN MIZUNO, DOMINIC P. GENTILE,
TERRANCE G. REED,

Appellants,

v.

BANKRUPTCY ESTATE OF KEN MIZUNO,

Appellee.

ORDER RE: REMAND

[stamp—FILED; NOV 21 1995; CLERK, U.S DIRTRICT COURT; CENTRAL DISTRICT OF CALIFORNIA; SOUTHERN DIVISION AT SANTA ANA; /s/ JL, DEPUTY]

Based upon the reasons set forth in the Court's Minute Order dated 6/21/95, which is incorporated herein;

IT IS ORDERED that the Orders of the Bankruptcy Court entered March 10, 1995 and March 24, 1995, granting summary judgment against Defendant Mizuno and partial summary judgment against Defendants Gentile and Reed, are reversed and the abovementioned action is remanded to the Bankruptcy Court.

DATED: 6/21/95

LINDA H. McLAUGHLIN
United States District Judge

CIVIL MINUTES

PRESENT:

HON. Linda H. McLaughlin, JUDGE

PROCEEDINGS:

(I) SUMMARY JUDGMENT APPEALS

IN CHAMBERS:

Based on the papers submitted by the parties and applicable law, pursuant to F.R. Civ. P. 78 and Local Rule 7.11, the Court now rules as follows:

I. SA CV 95-337 LHM/SA CV 95-367 LHM

(1) **Standard of Review.** The court reviews *de novo* a bankruptcy court's grant of summary judgment. *In re That's Entertainment marketing Group, Inc.,* 168 B. R. 226, 228-29 (N.D. Cal. 1994). Legal issues decided by the bankruptcy court are reviewed *de novo,* while factual findings are reviewed under the clearly erroneous standard. *In re Siriani,* 967 F. 2d 302 (9th Cir. 1992).

(2) **Standing.** Standing is a threshold issue that may be raised at any time. *National Org. of Women v. Scheidler,* 114 S. Ct. 798, 802 (1994).

(3) **Standing for Stay Violation.** The Court finds that Plaintiff lacked standing to bring the adversary action.

> (i) The Bankruptcy Code delegates to the trustee the capacity to sue and be sued, and similar functions to the debtor, absent a trustee. 11 U.S.C. § § 323, 1107 (a). Only the debtor or the trustee has standing to bring claims for violation of the automatic stay. *See In re Pecan Groves of Arizona,* 951 F.2d 242, 245 (9th Cir. 1991) ("Language from many cases indicates that, if the trustee does not seek to enforce the protection of the

automatic stay, no other party may challenge acts purportedly in violation of the automatic stay.''); *In re Brooks,* 79 B.R. 479, 481 (Bankr. 9th Cir. 1987) (''if the debtor or the trustee chooses not to invoke the protections of § 362, no other party may attack any acts in violation of the automatic stay''); *In re Stivers,* 31 B.R. 735, 735 (Bankr. N.D. Cal. 1983).

(ii) The record does not indicate that Ohashi was appointed trustee of the bankruptcy estate pursuant to 11 U.S.C. § § 321-323.

(iii) Ohashi is not the debtor. When Ohashi commenced the bankruptcy proceedings by means of involuntary petition, Ken Mizuno was of course identified as the debtor.

No judgment of the bankruptcy court in the record contains a determination that the ''Estate of Ken Mizuno,'' rather than Ken Mizuno, is the debtor in the underlying bankruptcy. Absent findings by the court, it cannot be said that the 7/10/92 and 10/7/92 orders denying motions to vacate the order of relief made such a determination.

Applying by analogy traditional rules of issue preclusion, when the content of a judgment is unclear, only those determinations necessary to support a judgment are considered decided. Because the abovementioned orders can be construed as determinations that the commencement of the bankruptcy proceedings was proper, the Court cannot say that they held Mizuno was not the debtor.

(4) **Standing for § 362 (h).** Under prevailing Ninth Circuit law, only natural persons are ''individuals'' with standing to bring claims for damages under 11 U.S.C. § 362 (h). *In re Goodman,* 991 F.2d 613, 619-20 (9th Cir. 1993).

Plaintiff, the estate of Ken Mizuno, is not a natural person. Therefore, Plaintiff lacked standing to assert the first count of its complaint.

(5) For the reasons discussed above, the bankruptcy court's grants of summary judgment against Defendant Mizuno and partial summary judgment against Defendants Gentile and Reed, by orders entered 3/10/95 and 3/24/95, are REVERSED and the abovementioned actions remanded.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[stamp—FILED; DEC 16 1997; CATHY A. CATTERSON, CLERK; U.S. COURT OF APPEALS]

* * * * * * * * * *

No. 96-55081
D.C. No. CV-95-00917-LHM

In re: KEN MIZUNO, Debtor.

KEN MIZUNO BANKRUPTCY ESTATE,
Plaintiff,

and

DUKE SALISBURY, Chapter 11 Trustee,
KENGO OHASHI,
Plaintiffs-Appellants,

v.

KEN MIZUNO, DOMINIC P. GENTILE,
TERRANCE G. REED,
Defendants-Appellees.

* * * * * * * * * *

Before: BROWNING, FLETCHER and KOZINSKI, Circuit Judges

ORDER

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.